

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

LUIS R. ROLDAN, ET AL.	§	
Vs.	§	CIVIL ACTION NO. 2:03-CV-371
TURNER BROTHERS TRUCKING, INC.	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs Luis R. and Bobbie Roldan (hereinafter “Roldans”) sued Defendant Turner Brothers Trucking, Inc. (hereinafter “Turner Brothers”¹) for personal injuries relating to a November 9, 2001, automobile accident between the Roldans and Brian Taylor, an alleged employee of Turner Brothers working in the course and scope of his employment. Before the Court is Defendant Turner Brothers Trucking, Inc.’s Motion for Summary Judgment (#15). The Court is of the opinion that the following order should issue.

I. Facts

The Roldans sued Turner Brothers on October 28, 2003, but did not serve Turner Brothers' agent for service, John Wallace.² The Roldans instead served U.S. Corp. Company. Based upon their service of U.S. Corp. Company, the Roldans took a default judgment against Turner Brothers

¹Turner Brothers alleges that Turner Brothers Trucking, Inc. became inactive in 2002 and was succeeded by Turner Brothers Trucking, L.L.C.

²The Roldans previously sued Turner Brothers in Texas state court, but took a non-suit after deposing Brian Taylor and allegedly learning Taylor was not acting in the course and scope of employment and that his employer was Turner Brothers Crane & Rigging, not Turner Brothers Trucking.

on November 23, 2004. When the Roldans served discovery in aid of judgment in July, 2005, Turner Brothers learned of the default judgment and moved this Court to vacate the default judgment. The Roldans submitted no response to Turner Brothers' Motion to Vacate Default Judgment. This Court set aside the default judgment on October 26, 2005. After Turner Brothers answered the Roldans' Complaint, Turner Brothers moved the Court for summary judgment based upon improper service and the running of the two year statute of limitations. The Roldans again did not submit any response to Turner Brothers' Motion for Summary Judgment, and the Court ordered the Roldans to submit a response. Counsel for the Roldans responded by requesting time to conduct discovery in order to determine whether a misnomer occurred.³ Out of an abundance of caution, the Court allowed the Roldans to "conduct discovery into the relationship, if any, between Turner Brothers Crane and Rigging and Defendant Turner Brothers Trucking, Inc. and the effect of any such relationship on the statute of limitations." Docket Entry 21. The Court entered its order granting limited discovery on January 11, 2006, and gave the Roldans sixty days to complete the discovery. Over sixty days have passed since the Court's order and the Roldans have not submitted any supplemental filings to this Court regarding Turner Brothers' Motion for Summary Judgment.

II. Discussion

The statute of limitations for personal injury actions in Texas is two years from the day the cause of action accrues. Tex. Civ Prac. & Rem. Code § 16.003(a). The accident at issue occurred on November 9, 2001, and the Roldans filed suit on October 28, 2003, which was within the two year period of limitations. However, the Roldans never properly served Turner Brothers. "The mere

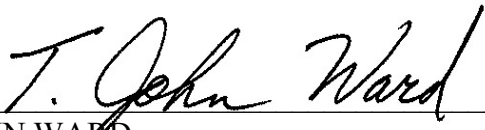
³Counsel for the Roldans claimed there was a possibility that Turner Brothers Trucking and Turner Brothers Crane and Rigging were alter egos and that a misnomer potentially occurred.

filing of a lawsuit within the limitations period is not sufficient; the defendant must also be served with process. However, the date of service relates back to the date of filing if the plaintiff exercised diligence in effecting service.” *James v. Gruma Corp.*, 129 S.W.3d 755, 759 (Tex. App.—Fort Worth 2004, pet denied). Therefore, unless the Roldans can demonstrate that they exercised diligence in attempting service, the statute of limitations will bar the Roldans’ claim. Under Texas law:

‘a plaintiff must not only file suit but also use due diligence in procuring service on the defendant in order to toll the statute of limitations’ and ‘lack of due diligence may be found as a matter of law if the plaintiff offers no excuse for his failure to procure service, or if plaintiff’s excuse conclusively negates diligence.’ *Saenz v. Keller Indus. of Tex., Inc.*, 951 F.2d 665, 667 (5th Cir.1992). This rule is applied to Texas law claims asserted in cases filed in federal courts in Texas. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S. Ct. 1978, 1986, 64 L. Ed. 2d 659 (1980); . . . *Jackson v. Duke*, 259 F.2d 3, 6 (5th Cir.1958).
Gonzales v. Wyatt, 157 F.3d 1016, 1021 n. 1 (5th Cir. 1998).

The Roldans have offered no excuse for their failure to serve the correct party. Therefore, this Court is inclined to hold that the Roldans failed to exercise due diligence in attempting service of process on Turner Brothers. As a consequence, the statute of limitations appears to have expired on the Roldans’ claim. Absent a properly supported response, filed within seven (7) days from the date of this order, the Court will GRANT summary judgment and dismiss this case.

SIGNED this 13th day of June, 2006.



T. JOHN WARD
UNITED STATES DISTRICT JUDGE